

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 2, 2003 Session

CITY OF KNOXVILLE v. ENTERTAINMENT RESOURCES, LLC.

**Appeal from the Chancery Court for Knox County
No. 98-140736-2 Daryl Fansler, Chancellor**

FILED NOVEMBER 21, 2003

No. E2002-01143-COA-R3-CV

This appeal questions the constitutionality of Knoxville Code § 16-468 and asserts that the Trial Court erred in its grant of a temporary injunction against the Appellant, Entertainment Resources, LLC. We declare the ordinance unconstitutional, reverse the judgment of the Trial Court and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed; Cause Remanded

HOUSTON M. GODDARD, P.J., delivered the opinion of the court, in which HERSCHEL P. FRANKS and CHARLES D. SUSANO, JR. JJ., joined.

Philip N. Elbert and Richard L. Gaines, Nashville, Tennessee, for the Appellant, Entertainment Resources, LLC.

Angela R. Bolton, Beverly B. Clemer, Hillary B. Jones and Michael S. Kelley, Knoxville, Tennessee, for the Appellee, City of Knoxville

OPINION

Entertainment Resources, LLC., (hereinafter “Entertainment Resources”), owns and operates a number of videotape movie rental stores in Nashville. In 1998 Entertainment Resources formulated a plan to open three such stores in Knoxville at approximate three month intervals. In accordance with this plan, in August of 1998, Entertainment Resources opened a store on Papermill Road in Knoxville under the name “Fantasy Video” and began selling and renting videotapes for home viewing. The front room of the store was stocked with a mix of videotapes rated G, PG-13, and R, as well as un-rated videotapes, while the back room of the store was stocked with sexually explicit X-rated videotapes.

At all times relevant to this case Knoxville Code section 16-468 (hereinafter also referred to as “the ordinance”) was in effect providing in pertinent part as follows:

Sec. 16-468. Location of adult businesses.

(a) For the purpose of this section, the following words and phrases shall have the meanings ascribed to them in this subsection:

Adult bookstore means an establishment having as a substantial or significant portion of its stock and trade books, magazines and other periodicals, videotapes or other electronic media which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, or an establishment with a segment or a section devoted to the sale or display of such material.

Adult business means any of the following businesses: adult bookstore, adult motion picture theatre, adult mini motion picture theatre, and adult cabaret.

...

(b) It shall be unlawful to establish, operate or maintain any adult business, that is, adult bookstore, adult motion picture theatre, adult mini motion picture theatre or adult cabaret, within the city, if the proposed location is within one thousand (1,000) feet of:

- (1) A residentially zoned district;
- (2) Any area of amusement which caters to family entertainment;
- (3) Any area which is devoted in part or exclusively to recreational activity;
- (4) Any school, park, church, mortuary or hospital;
- (5) Any adult businesses as defined by this section; or
- (6) Any other regulated use, including but not limited to establishments authorized to sell any alcoholic beverages for on-or off-premises consumption.

Knoxville Police Department officers began conducting almost daily inspections of Fantasy Video from the date of its opening and on each inspection issued citations charging violations of the ordinance. It is stipulated that, at the time these citations were issued, Fantasy Video was located within one thousand feet of a residentially zoned district separated from the store by Interstate-40

and also within one thousand feet of an establishment licensed to sell liquor and a Boy Scouts office. However, it is also stipulated that Vince Bohanan, the managing member of Entertainment Resources who conducted a search of available locations in Knoxville, was not able to find a location where he could place the store that did not appear to be within one thousand feet of an establishment that sold liquor or beer and, at the time, he believed that the term “alcoholic beverages” included beer as well as liquor. It is further stipulated that Mr. Bohanan was not aware that the City would consider the store to be within one thousand feet of a residentially zoned district which was on the other side of Interstate-40 or that the City would consider the Boy Scouts administrative office to be a place devoted in part or exclusively to recreational use.

Following the opening of the store on Papermill Road, Entertainment Resources attempted on several occasions to avoid classification as an “adult bookstore” by reducing its stock of sexually explicit videotapes, by purchasing additional general release videotapes at a cost of \$15,000.00, acquiring additional front room movie display shelves at a cost of \$3,000.00 and by moving a wall at a cost of \$1,500.00 to reduce the portion of square footage store space in the back room and increase the square footage of the front room portion of the store.

On November 4, 1998, the Appellee, City of Knoxville, hereinafter “the City”, filed a complaint in the Knox County Chancery Court requesting that temporary and permanent injunctions be issued against Entertainment Resources. The complaint asserts that, in operating Fantasy Video, Entertainment Resources is operating an “adult bookstore” in violation of Knoxville City Code section 16-468. The complaint further states that, despite repeated citations and fines, Entertainment Resources continues to operate Fantasy Video in violation of the ordinance, that irreparable harm will result absent enjoinder of such operations and that a temporary injunction is necessary to preserve *status quo* pending a hearing on the City’s request for a permanent injunction.

After hearing was held on the City’s complaint on December 8, 1998, the Trial Court announced that:

[T]he defendant, Entertainment Resources doing business as Fantasy Video will be temporarily enjoined during the pendency of this action from operating an adult bookstore at 6422 Papermill Road, Knoxville, Tennessee. This holding is based on the fact that a substantial and significant portion of the store’s stock in trade is comprised of videos which are characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas as defined in the ordinance. The injunction is not based on the fact that the store has a segment or section devoted to the sale or display of such material.

Thereafter, on December 21, 1998, the Trial Court entered its order granting the temporary injunction against Entertainment Resources. A subsequent motion by Entertainment Resources seeking interlocutory appeal was denied.

On March 18, 1999, Entertainment Resources filed its answer to the City's complaint, counterclaiming for a declaratory judgment that Knoxville Code section 16-468 is unconstitutional and seeking compensation for damages and attorney fees incurred as a result of its enforcement.

In January of 2001, Entertainment Resources lost its lease on the Papermill Road property and possession was transferred to the landlord on February 28, 2001. Thereafter, the City filed a motion to voluntarily dismiss its complaint for injunctive relief, which motion was granted on the basis that, upon closure of the store, the case was moot. The Court noted, however, that Entertainment Resources retained the right to seek damages should it turn out that the temporary injunction was wrongfully issued.

On April 15, 2002, the Trial Court entered its memorandum opinion and order adopting findings of fact and conclusions of law proposed by the City and holding that Entertainment Resources was not wrongfully enjoined from operating the video store on Papermill Road and that all other issues involved in the case were moot. The order further provides that the case be dismissed with costs taxed to Entertainment Resources. Following entry of this memorandum and order Entertainment Resources filed its notice of appeal.

The issues submitted for review are restated as follows:

1. Is this case a proper matter for declaratory relief?
2. Are the terms of Knoxville City Code Section 16-468 unconstitutionally vague?
3. Did the temporary injunction against Entertainment Resources violate T.R.C.P. 65.02(1)?
4. Is Entertainment Resources entitled to recovery of damages in this case?

Our standard of review in this non-jury case is *de novo* upon the record of the proceedings below and there is no presumption of correctness with respect to the Trial Court's conclusions of law. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26 (Tenn. 1996) and T.R.A.P. 13(d). The Trial Court's factual findings are, however, presumed to be correct and we must affirm such findings absent evidence preponderating to the contrary. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87 (Tenn. 1993).

The first issue we address is whether this case is a proper matter for declaratory relief.

In its counterclaim filed on March 18, 1999, Entertainment Resources requested declaratory relief regarding the constitutionality of the ordinance in question pursuant to the Tennessee Declaratory Judgments Act as embodied at T.C.A. 29-14-101, *et seq.* The Trial Court held that upon closure of the store this issue, along with all other issues except the issue of the propriety of the temporary injunction and resulting damages, became moot. In accord, the City points out that at the time of trial below, Fantasy Video was no longer located on Papermill Road, there was no proof that

Entertainment Resources had attempted to reopen any location within Knoxville, and that Entertainment Resources no longer had a presence in Knoxville. The City recognizes that the parties have stipulated that Entertainment Resources intends to open and operate more than one video store location in Knoxville if and when a judicial determination is made regarding the constitutionality of the ordinance and that Entertainment Resources has the financial means and capability to open a video store in Knoxville. However, the City contends that the *intentions* of Entertainment Resources are insufficient to create a justiciable controversy. In support of its argument the City cites *West v. Carr*, 370 S.W.2d 469 (Tenn. 1963) wherein the Tennessee Supreme Court stated as follows:

[The Declaratory Judgments] Act deals only with present rights that have accrued under presently existing facts. It gives the Court no power to determine future rights or possible controversies in anticipation of events that may not occur. (Citations omitted)

It does not enable courts to give advisory opinions upon what the law would be upon a theoretical or hypothetical state of facts.

The City asserts that Entertainment Resources is requesting a decision based upon a hypothetical set of facts that may never occur and, therefore, declaratory relief should be denied.

It is unnecessary that we decide whether the referenced stipulations of the parties regarding Entertainment Resources' future plans and intentions are sufficient to show a justiciable controversy because of the following additional stipulation:

Hearings on a number of citations issued with respect to the Papermill Road store have been held in Knoxville City Court. The City Court judge found the Ordinance had been violated. The citations are all on appeal to Circuit Court, where they are being held in abeyance with the agreement of the parties pending the outcome of this case.

Elsewhere in its brief the City notes that, as of the date of its November 4, 1998, complaint fines and costs of nearly \$4,000.00 had been imposed by the Knoxville Municipal Court.

In *Parks v. Alexander*, 608 S.W.2d 881 (Tenn. Ct. App. 1980), we noted that in order for there to be a justiciable controversy which will warrant a declaratory judgment action "a real question rather than a theoretical one must be presented and a real legally protectable interest must be at stake on the part of the plaintiff." It is our determination that Entertainment Resources has a "real legally protectable interest at stake" in its appeals to the Circuit Court and the issue raised regarding the constitutionality of the ordinance presents "a real question" in that the resolution of such issue will have a decisive effect upon the outcome of those appeals.

It is well settled that the purpose of the Declaratory Judgment Act "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is

to be liberally construed and administered.” *Shelby County Bd. of Com’rs. v. Shelby County Quarterly Court*, 392 S.W.2d 935 (Tenn. 1965) citing *Miller v. Miller*, 261 S.W. 965 (1923). Under the circumstance presented in the present matter we find that it is appropriate that we entertain the request for declaratory relief.

The next issue we address is whether Knoxville Code Section 16-468 is unconstitutionally vague under the First Amendment of the United States Constitution and under Article I, section 19 of the Tennessee Constitution.

The First Amendment is applicable to the States through the Fourteenth Amendment and provides in pertinent part that “Congress shall make no law ... abridging the freedom of speech or of the press.” Article I, section 19 of the Tennessee Constitution similarly provides in pertinent part that “the free communication of thoughts and opinions is one of the invaluable rights of man and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.”

The standard applicable in determining whether a statute or ordinance is unconstitutionally vague is whether “it requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *Connally v. General Construction Co.*, 269 U.S. 385 (1926).

In *Grayned v. City of Rockford*, 408 U.S. 104 (1972) the Supreme Court stated as follows at pages 108-109:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute “abuts upon sensitive areas of basic First Amendment freedoms,” it “operates to inhibit the exercise of [those] freedoms.” Uncertain meanings inevitably lead citizens to “steer far wider of the unlawful zone’ ... than if the boundaries of the forbidden areas were clearly marked.” (Citations omitted.)

As further noted by the Supreme Court of this state in *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993) at page 531:

In the context of First Amendment cases, the Supreme Court has imposed a more stringent rule which requires that statutes that impinge on the area of freedom of expression must have a greater degree of specificity than in other contexts, so as to insure that citizens will not be “chilled” from exercising their constitutional right to free expression.

The ordinance in the instant matter governs the location of any business determined to be an “adult bookstore” and defines “adult bookstore” as “an establishment having as a *substantial or significant* portion of its stock and trade books, magazines and other periodicals, videotapes or other electronic media which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, or an establishment with a segment or section devoted to the sale or display of such material.” (Emphasis added.)

Entertainment Resources specifically contends that the phrase “substantial or significant” is vague and that the ordinance does not provide guidance as to its meaning. As a result, Entertainment Resources asserts that it could not determine at what point it would be deemed to be an “adult bookstore” under the ordinance and, therefore, could not determine at what point it could operate without violating the temporary injunction which enjoined it from operating as an “adult bookstore” at the location in question.

Sergeant Rick Ferguson, the officer in charge of the Inspection Division for the Knoxville Police Department, supervised the inspection and citation of Fantasy Video. Sergeant Ferguson testified that he could not define “substantial” other than “substantial means substantial as red means red; I know red when I see it, but I can’t describe red.” Sergeant Ferguson further testified that “significant to me means a quantity of something that, compared to something else.” When asked to define the terms “substantial” and “significant”, Officer Phil Major who worked under Sergeant Ferguson’s supervision, testified that “substantial is substantial. I don’t really have an opinion on the definition of substantial, it is self-explanatory.” Officer Major further testified that “significant is just like substantial, I mean, significant is significant, just as substantial is substantial.” These officers also stated that in making the evaluation of “substantial” and “significant” they would look to what appeared to them to be the “important part of the business.”

This testimony, all of which is stipulated by the parties and all of which was provided by witnesses for the City, shows that the officers who issued the citations against Entertainment Resources for violation of the ordinance are unable to offer an objective definition of the meaning of the terms “substantial” and “significant” and that the definitions they present are nothing more than tautologies.

The City argues that the police officers’ testimony is irrelevant to a determination of whether the ordinance is unconstitutionally vague and that such testimony should not be considered by us in that regard. In support of this argument the City cites *Dempsey v. Correct Mfg. Corp.*, 755 S.W.2d 798 (Tenn. Ct. App. 1988) and *Hung v. Otis Elevator Co., Inc.*, an unpublished opinion of this Court filed in Nashville on October 11, 1995.

In *Dempsey* the plaintiff submitted the affidavit of an electrical engineer wherein the engineer attested that he had read the regulations which were relevant in that case and, based upon such reading, stated his interpretation of the statute with respect to the defendant's duties. This Court stated at page 806:

The content meaning and application of statutes and regulations are not a matter of fact to be proven by the affidavit of an expert witness, but are a matter of law to be presented by brief and argument of counsel supported by citations and authorities.

In *Hung* the plaintiff offered the affidavit of an engineer in which the engineer set forth his opinion as to the intent of a rule appearing in the Elevator Safety Code with regard to the duties of escalator manufacturers. Citing *Dempsey, supra*, we found that the opinions of the electrical engineer concerning the intent of the legislature and the intent of the rule were inadmissible into evidence.

In the matter before us the officers' testimony does not present their determination as to whether Knoxville City Code section is unconstitutional. Were that the case we would be obliged to disregard such testimony under the authority of *Dempsey* and *Hung*. However, the fact that those charged with enforcement of the ordinance are themselves unable to define crucial terms in a way that would provide adequate guidance to those who might be subject to the ordinance is evidence we can consider in making our independent determination with respect to whether the ordinance is unconstitutionally vague.

In addition to the testimony of the officers referenced above, it is stipulated that Entertainment Resources asked the police conducting the inspections what portion of its stock was permitted to be sexually explicit material without making the business an adult bookstore under the ordinance and was unable to obtain any guidance. It is further stipulated that the City Court judge assigned to hear the citations issued to Entertainment Resources advised that he did not know what percentage of stock of adult videotapes would be allowed under the ordinance.

In *Ellwest Stereo Theater, Inc.*, 718 F. Supp. 1553 (M.D. Tenn. 1989) the Court analyzed an ordinance governing the licensing of adult oriented businesses in Nashville which utilized the language at issue in the present case stating as follows as set forth at page 1581:

'Adult Bookstore' means an establishment having as a *substantial or significant* portion of its stock and trade in books, films, video cassettes, or magazines and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' (Emphasis added.)

The plaintiff in *Ellwest* argued that "the phrase 'substantial or significant' is vague and overbroad and does not put the owner of a bookstore which sells such adult-oriented material on

notice of whether it is an ‘adult bookstore’ as defined by the ordinance.” Noting the testimony of a health department official charged with administering the ordinance which showed that he could not quantify the phrase “significant or substantial”, this Court found the ordinance in *Ellwest* to be both overbroad and vague stating as follows at page 1581:

The Court finds it extremely revealing that a representative of the Health Department, the agency charged with administering this ordinance, was unable to determine under the ordinance which establishments it was entitled to regulate. Clearly, if the regulating authority cannot determine the establishments which are subject to its authority, the establishments themselves cannot be expected to determine whether they need to be licensed or not.

Although the City states in its brief “the officers actually had no trouble understanding the Ordinance or enforcing its terms”, it is our determination that any such understanding and enforcement must necessarily have been based upon the officers’ subjective analysis and not upon an objective standard which would serve to guide a citizen seeking to comply with the ordinance. The fact that the officers issued citations under the ordinance is not evidence that the ordinance is constitutional.

The problem with the use of terms such as “significant” or “substantial” is that they must suffice for application to a wide range of situations across a broad spectrum. While there will most likely be agreement as to those situations falling at either extreme of the spectrum, without more specificity, there will be inevitable disagreement as to those situations near the middle of the spectrum and “men of common intelligence” seeking to apply the ordinance “must necessarily guess at its meaning and differ as to its application.” Accordingly we find that Knoxville City Code section 16-468 is unconstitutionally vague and, therefore, unenforceable.

Although Entertainment Resources raises other issues regarding the constitutionality of the ordinance, in our discretion we decline to address those issues having otherwise determined, for the reasons stated above, that the ordinance is unconstitutional and unenforceable.

The next issue we address is whether the Trial Court erred in its issuance of the temporary injunction against Entertainment Resources.

T.R.C.P. 65.02(1) provides as follows:

Every restraining order or injunction shall be specific in terms and shall describe in reasonable detail, and not by reference to the complaint or other document, the act restrained or enjoined.

The order of the Trial Court entered on December 21, 1998, temporarily enjoined Entertainment Resources “from operating an adult bookstore” during the pendency of the case. Given our finding that the ordinance’s definition of “adult bookstore” is unconstitutionally vague

it necessarily follows that the injunction fails to specify “in reasonable detail ...the act ... enjoined.” Accordingly, it is our determination that the temporary injunction violates T.R.C.P. 65.02(1).

The final issue we address in this appeal relates to the matter of damages. Entertainment Resources seeks damages under 42 U.S.C. section 1983 for lost profits, out-of pocket expenses and attorney fees. The City asserts that “Entertainment Resources damage claims are too speculative in nature to support a judgment and that the company failed to mitigate its damages after entry of the temporary injunction.”

42 U.S.C. section 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceedings for redress

This Court has, on prior occasion, recognized that the remedial purpose of 42 U.S.C. section 1983 is “to ‘ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief.’” *Pendleton v. Mills*, 73 S.W.3d 115 (Tenn. Ct. App. 2001) citing *Burnett v. Grattan*, 468 U.S. 42 (1984).

In the case before us the parties have specifically stipulated that “Entertainment Resources has lost profits because of the entry of the preliminary injunction in this cause.” The law in this state provides that while speculative damages are not recoverable “‘mere uncertainty as to the amount will not prevent recovery if the evidence is of such certainty as the nature of the case permits and such as to lay a foundation enabling the triers of the facts to make a fair and reasonable assessment of damages.” *Wilson v. Farmers Chemical Association*, 444 S.W.2d 185 (Tenn. Ct. App. 1969).

In support of its argument that Entertainment Resources damages attributable to lost profits suffered by Fantasy Video are too speculative for recovery the City references testimony of a certified public accountant hired by Entertainment Resources to the effect that one year was a normal operating cycle to predict the finances of a business and the City asserts that Fantasy Video was only open for four months before the temporary injunction was entered. The City also notes that the same witness testified that the businesses used for comparison were not located in the Knoxville geographic market. We disagree that this testimony warrants the conclusion that damages in this case are too speculative to support a judgment and it is our finding that a trier of fact might reasonably assess damages for lost profits based upon the performance of similar businesses taking into account relevant variables.

Entertainment Resources requests that we instruct the Trial Court to award it damages for lost profits for a second and third store it “had formulated a business plan to open.” While we do

not find that lost profit damages are too speculative with regard to the store at Papermill Road, which was open and operating, we do find that such damages are too speculative with regard to the non-existent second and third stores that were merely planned. Accordingly, this request of Entertainment Resources is denied.

As to the City's argument that Entertainment Resources failed to mitigate its damages it is our determination that it is appropriate that such argument be addressed by the Trial Court upon remand.

The parties appear to be in agreement that the propriety of awarding attorney fees in this case is also a matter that is properly addressed by the Trial Court upon remand.

Based upon the foregoing we reverse the judgment of the Trial Court and declare Knoxville Code section 16-468 unconstitutional and unenforceable and remand the cause as to the matter of damages. Costs of appeal are adjudged against the City of Knoxville.

HOUSTON M. GODDARD, PRESIDING JUDGE